Supreme Court, U.S.
FILED

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NO. _____

UNITED STATES SUPREME COURT

October Term, 1993

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JOSE DELGADO GARCIA and SONYA DELGADO,
Petitioners

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR FIRST CITY, TEXAS -- HOUSTON, N.A. F/K/A FIRST CITY NATIONAL BANK OF HOUSTON -- McALLEN; NEW FIRST CITY, TEXAS -- HOUSTON, N.A., ITS TRANSFEREE, TEXAS COMMERCE BANK, NATIONAL ASSOCIATION, and GLENN W. TIMMONS,
Respondents

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On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I.

Whether a litigant's right to due process of law under the Fourteenth Amendment to the United States Constitution is violated when a state trial court employs devices unknown and unauthorized under state law to dispose of a lawsuit.

II.

Whether a litigant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution is violated when a federal court of appeals disposes of a case without opinion by placing it on the summary calendar in those instances where the case does not qualify to be placed on the summary calendar under the rules of the particular federal court of appeals.

## PARTIES TO THE PROCEEDING

The following is a listing of all parties to the proceeding in the court whose judgment is sought to be reviewed:

1. Jose Delgado Garcia, Plaintiff in the trial court, Appellant in the Court of Appeals, and Petitioner herein.

2. Sonya Delgado, Plaintiff in the trial court, Appellant in the Court of Appeals, and Petitioner herein.

3. First City, Texas -- Houston, N.A. f/k/a First City National Bank of Houston -- McAllen, Defendant in the trial court, Appellee in the Court of Appeals, and predecessor-in-interest of Respondent Texas Commerce Bank, National Association.

4. Glenn W. Timmons, Defendant in the trial court, Appellee in the Court of Appeals, and Respondent herein.

5. Federal Deposit Insurance

Corporation, Appellee in the Court of Appeals, and Respondent herein.

6. New First City, Texas -- Houston, N.A., Appellee in the Court of Appeals, and Respondent herein.

7. Texas Commerce Bank, National Association, Appellee in the Court of Appeals, and Respondent herein.

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## OPINIONS BELOW

The trial court, the 370th District Court of Hidalgo County, Texas, conducted a four-day jury trial, and at the close of Plaintiff's case did two things, to-wit: (1) granted a directed verdict in favor of Respondents, and (2) granted a "judgment on the pleadings" in favor of First City, Texas -- Houston, N.A. against Petitioners in the sum of $50,000.00. An appeal in the Texas Thirteenth Court of Appeals was abated when First City, Texas -- Houston, N.A. was declared insolvent, and the Federal Deposit Insurance Corporation removed the lawsuit to The United States District Court For The Southern District of Texas, McAllen Division. The Honorable George P. Kazen entered an order adopting the state court judgment as the judgment of the United

States District Court, and Petitioners appealed to the United States Court of Appeals For The Fifth Circuit, which affirmed without opinion. A Motion For Rehearing was denied by order of the United States Court of Appeals For The Fifth Circuit entered on January 6, 1994.

## JURISDICTION

Petitioners seek review of a judgment entered by the United States Court of Appeals For The Fifth Circuit. The date of entry of the judgment was December 9, 1993. Petitioners as Appellants in the Court of Appeals filed a Motion For Rehearing, which was denied by order entered January 6, 1994.

Section 1254(1) of Title 28, United States Code, confers to the United States Supreme Court the jurisdiction to review the judgment by writ of certiorari.

## PERTINENT CONSTITUTIONAL, STATUTORY, AND COURT RULE PROVISIONS

A. Fifth Amendment, United States Constitution

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

B. Fourteenth Amendment, United States Constitution

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> . . .[N]or shall any State deprive any person of life, liberty, or property,

without due process of law.

C. Local Rule 47.6 of the United States Court of Appeals For The Fifth Circuit provides as follows:

> **47.6 Affirmance Without Opinion**
> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an

administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no reversible error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders:

"AFFIRMED. See Loc.R.47.6." or "ENFORCED. See Loc.R.47.6."

## STATEMENT OF THE CASE

Petitioners filed a lawsuit in the 370th District Court of Hidalgo County, Texas and obtained a temporary restraining order prohibiting the foreclosure of real property. After a trial on temporary injunction, the Honorable Donald W. Allee granted a temporary injunction prohibiting foreclosure upon the real property until final trial. Meanwhile, First City filed a counterclaim for $50,000.00 principal on the note, interest, and attorney's fees.

The case was called for trial before Judge Harry Lewis, a visiting judge. Petitioners presented evidence that (1) First City had financed the purchase of the real property in question by Petitioners from a corporation named Desa Group, Inc.; (2) Petitioners had signed a note for $50,000.00, pledged the real

property in question, and thereafter First City refused to give Petitioners the full $50,000.00; (3) the actions of First City and Timmons had caused damage to Petitioners.

After Petitioners rested, the trial court granted a directed verdict in favor of First City and Timmons. Without hearing any further evidence, the trial court granted First City a "judgment on the pleadings" on the counterclaim for $50,000.00 without requiring First City to put on any evidence and without allowing Petitioners to present any evidence of their affirmative defenses. The only issue that was presented to the jury for consideration was the amount of attorney's fees that should be awarded to First City. After the trial court interrupted and prohibited Petitioners' counsel from

making his final argument to the jury, co-counsel concluded the argument, and the jury responded with an award of "$00.00."

After a Motion For New Trial had been overruled by operation of law, the case was appealed to the Thirteenth Court of Appeals For The State of Texas. That appeal was abated when First City was declared insolvent on or about October 30, 1992, and substitution of the Federal Deposit Insurance Corporation led to removal of the lawsuit on December 4, 1992 to The United States District Court For The Southern District of Texas, McAllen Division, by authority of 12 U.S.C. §1819(b)(2)(B) . The Honorable George P. Kazen entered an order adopting the state court judgment as the judgment of the United States District Court, and the case was appealed to the United States Court of

Appeals For The Fifth Circuit. The United States Court of Appeals For The Fifth Circuit acquired jurisdiction by authority of 28 U.S.C. § 1291.

In their Brief For Appellants to the United States Court of Appeals, Petitioners stated Issue No 2 as follows:

> THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR JUDGMENT ON THE PLEADINGS ON APPELLEE FIRST CITY'S COUNTERCLAIM BECAUSE SUCH ACTION VIOLATED APPELLANTS' RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS A MATTER OF LAW.

Brief For Appellant, p. xv; p.1.

Respondents' trial counsel moved for a judgment on the pleadings, stating:

"YES YOUR HONOR. I'VE GOT A COUNTERCLAIM. AND AT THIS TIME I MOVE FOR JUDGMENT ON THE PLEADINGS IF I MAY."

Statement of Facts, Volume V, p. 632, l. 5-7.

Petitioners' trial counsel preserved an error via objection, stating:

"I'M GOING TO OBJECT TO THIS, YOUR HONOR. I DON'T KNOW UNDER WHAT VEHICLE COUNSEL IS PROCEEDING UNDER. LAST TIME I CHECKED THIS WAS A TRIAL, APPARENTLY I MUST HAVE STEPPED OUT AND STEPPED BACK INTO EITHER A SUMMARY JUDGMENT HEARING OF SOME TYPE."

Statement of Facts, Volume V, p. 634, l. 25 through p. 635 l.4.

The United States Court of Appeals

For The Fifth Circuit, after conducting oral argument, entered an order affirming the judgment of the trial court without written opinion. The order stated: "AFFIRMED. See Loc.R.47.6."

Petitioners filed a Motion For Rehearing and asserted that the case at bar did not fall within any of the four classes of cases specified by Local Rule 47.6 of the United States Court of Appeals For The Fifth Circuit. The Motion For Rehearing was denied by order entered January 6, 1994.

## REASONS FOR GRANTING WRIT

I. **A litigant's right to due process of law under the Fourteenth Amendment to the United States Constitution is violated when a trial court employs devices unknown and**

**unauthorized under state law to dispose of a lawsuit.**

After Petitioners had put on evidence in support of their case-in-chief, Petitioners rested. Thereafter, Respondents were granted a directed verdict on all of Petitioners' claims. Respondents then moved for a "judgment on the pleadings" and sought judgment on the bank's counterclaim for the $50,000.00 allegedly due under the note. Petitioners had pleaded affirmative defenses, including breach of contract, fraud, and homestead. Petitioners advised the trial court after Respondents had moved for "judgment on the pleadings" that affirmative defenses had been pleaded, and that Petitioners were entitled to put on evidence in support of those defenses. Petitioners further pointed out to the

trial court that Respondents had not presented their case-in-chief. Nevertheless, the trial court without hearing any additional evidence granted First City a "judgment on the pleadings" on the face amount of the note in the sum of $50,000.00. Such action by the trial court deprived Petitioners of their day in court to contest their liability on the counterclaim.

In Derbigny v. Bank One, 809 S.W.2d 292, 294 (Tex. App. -- Houston [14th Dist.] 1991, no writ), a trial court after calling a case for trial struck the appellants' amended answer and counterclaim when it had been filed after the pleading deadline. The trial court then proceeded to render judgment for Bank One without hearing evidence. "The court did not grant a summary judgment nor did

it render a default judgment or nihil dicit judgment, since appellants' [sic] filed an answer and appeared for trial." The Fourteenth District Texas Court of Appeals held that such actions violated appellants' right to due process of law.

The Derbingy case further states:

> Fundamental to the concept of due process is the right to be heard. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1984, 32 L.Ed.2d 556 (1972). The right to be heard assures having a full hearing before a court having jurisdiction of the matter, the right to introduce evidence at a meaningful time and in a meaningful manner, and to have judicial findings based upon that evidence. Id.;

> Turcotte [v. Trevino], 499 S.W.2d at 723. It includes also an opportunity to cross-examine witnesses, to produce witnesses, to be heard on questions of law, and the right to have judgment rendered after trial. 653 S.W.2d at 358. The trial court deprived appellants of this right.

Derbingy v. Bank One, 809 S.W.2d 292, 294-295 (Tex. App. -- Houston [14th Dist.] 1991, no writ).

Like the facts in Derbigny, the case at bar did not involve a summary judgment, nor did it involve a default judgment or a nil dicit judgment. Petitioners appeared at trial and presented evidence in support of their case-in-chief. On the fourth day of trial, and before Respondents had

called a single witness, the trial court granted a "judgment on the pleadings," despite the fact that such a mechanism is unknown under the laws or Rules of Civil Procedure of the State of Texas. Petitioners rightfully believed that they would be given the opportunity to present defensive evidence in support of their pleaded affirmative defenses after First City presented its case-in-chief on its counterclaim. Prior to the granting of the "judgment on the pleadings," Petitioners informed the trial court of their right to present defensive evidence, including want or failure of consideration. Despite such notice, the trial court elected to disallow Petitioners the right to present defensive evidence and grant "judgment on the pleadings."

The case at bar was not a suit on sworn account, where an abbreviated procedure would be authorized under Tex. R. Civ. P. 185. See Brown Foundation v. Friendly Chevrolet Co., 715 S.W.2d 115 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.). Instead, the trial court utilized a maneuver without foundation in the Texas Rules of Civil Procedure that in effect violated Petitioners' right to due process of law by depriving Petitioners of a full hearing as well as the ability to present evidence at a meaningful time.

In Creel v. District Attorney For Medina County, Texas, 818 S.W.2d 45, 46 (Tex. 1991), a trial court dismissed an inmate's petition for writ of mandamus without notice or hearing. As such action was not authorized by the laws of Texas, the Texas Supreme Court held that such

actions by the trial court deprived the inmate of his right to due process of law.

Petitioners submit that this case would present an excellent opportunity for the United States Supreme Court to declare without hesitation that when a state court utilizes devices and procedures unknown and unauthorized under its own law to render a judgment, then such actions constitute a violation of due process of law.

**II. A litigant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution is violated when a federal court of appeals disposes of a case without opinion by placing it on the summary calendar in those instances where the case does**

**not qualify to be placed on the summary calendar under the rules of the particular federal court of appeals.**

On December 9, 1993, in the case at bar a per curiam opinion was rendered by a panel of the United States Court of Appeals For The Fifth Circuit which stated as follows: "AFFIRMED. See Local Rule 47.6."

Local Rule 47.6 states as follows:

**47.6 Affirmance Without Opinion**

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based

on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no reversible error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may

> in its discretion enter either of the following orders: "AFFIRMED. See Loc.R.47.6." or "ENFORCED. See Loc.R.47.6."

Local Rule 47.6, United States Court of Appeals For The Fifth Circuit.

The case at bar does not fall within any of the four prongs specified in Local Rule 47.6. The case does not fall within subsection (1) because it was a jury trial, and no findings of fact were made. The case does not fall within subsection (2) because Petitioners were not attacking the sufficiency of the evidence in support of a jury verdict, but instead were attacking the fact that (a) a verdict had been directed and (b) that "judgment on the pleadings" had been granted to Respondents even though such a vehicle is unknown to Texas law. Subsections (3) and

(4) are also inapplicable in that the case did not concern an administrative order or summary judgment, respectively.

As the case at bar does not fall within any of the four prongs authorized by Local Rule 47.6, Petitioners respectfully submit that the United States Court of Appeals For The Fifth Circuit erred in utilizing Local Rule 47.6 for disposition of the case.

In National Labor Relations Board v. Amalgamated Clothing Workers of America, 430 F.2d 966, 972 (5th Cir.1970), Chief Judge John R. Brown stated as follows:

> "A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the

factors, legal, factual, or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons id the thing out of which law -- and particularly Judge-made law -- grows. It is an essential part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. All Judges know that in some cases this latter factor may almost

completely transcend the importance of the case which is the vehicle bringing the questions forward.

"By Rule 21 [a predecessor rule substantially similar to Local Rule 47.6] the Court not only implicitly assumes the responsibility for evaluating this factor, but also is specifically commanded to make the conjunctive judicial determination that an opinion would have no precedential value. Having to make unanimously that determination, and implicitly, the further one that circumstances or factors, other than precedential value, do not make an opinion essential or appropriate, the Court, by

adoption of the Rule, affirms that it must be carefully and selectively employed.

"The Court recognizes that it must -- the word is must -- never apply the Rule to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues. This means that while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used." National Labor Relations Board v. Amalgamated Clothing Workers of America, 430 F.2d at 972.

National Labor Relations Board v. Amalgamated Clothing Workers of America, 430 F.2d at 971-72, states that one of its numbered subdivisions must apply before

Rule 21 can be invoked. By the very terms of Local Rule 47.6, the case must fall into one of the four categories before said rule can be applied.

The right of access to the courts is protected by the right to due process of law, i.e., the opportunity to access the courts must be at a meaningful time and in a meaningful manner. Matter of N.C. Trading, 586 F.2d 221 (C.C.P.A.1978).

A fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The right to due process of law under the Fifth Amendment to the United States Constitution is applicable to the judicial branch of government. In re New York, N.H. & H.R. Co., 289 F.Supp 451

(D.C.Conn.1968).

Thus, as the United States Court of Appeals For The Fifth Circuit erroneously utilized Local Rule 47.6 to dispose of this case, this case should be reversed and remanded for further proceedings including the issuance of an opinion of the panel outlining its reasons for affirmance or reversal.

## CONCLUSION

For the reasons stated herein, the United States Supreme Court should grant the Petition For Writ of Certiorari and reverse and remand the judgment of the court below.

Respectfully submitted,

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**ATTORNEY OF RECORD FOR PETITIONERS JOSE DELGADO GARCIA AND SONYA DELGADO**

**CERTIFICATE OF SERVICE**

I, PATRICIA ALVAREZ, a member of the Bar of the Supreme Court of the United States and counsel of record for Jose Delgado Garcia and Sonya Delgado, Petitioners herein, hereby certify that, pursuant to Rule 29.3, Rules of the Supreme Court, I served three copies of the foregoing Petitioner For Writ of Certiorari on each of the parties herein, as follows:

On Federal Deposit Insurance Corporation, Receiver For First City, Texas -- Houston, N.A. f/k/a First City

National Bank of Houston -- McAllen, by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the post office address of Deborah Greer, 1100 Mercantile Tower, Corpus Christi, Texas 78477.

On New First City, Texas -- Houston, N.A., by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the post office address of Deborah Greer, 1100 Mercantile Tower, Corpus Christi, Texas 78477.

On Texas Commerce Bank, National Association, by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the

post office address of Deborah Greer, 1100 Mercantile Tower, Corpus Christi, Texas 78477.

On Glenn W. Timmons, by depositing such copies in the United States Post Office or mail box in McAllen, Texas, with first class postage prepaid, properly addressed to the post office address of Edmundo O. Ramirez, 901 Texas Commerce Bank -- Neuhaus Tower, McAllen, Texas 78501.

All parties required to be served have been served.

Dated April 6, 1994.

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**ATTORNEY OF RECORD FOR PETITIONERS JOSE DELGADO GARCIA AND SONYA DELGADO**

NO. _____

UNITED STATES SUPREME COURT

October Term, 1993

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JOSE DELGADO GARCIA and SONYA DELGADO,
Petitioners

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR FIRST CITY, TEXAS -- HOUSTON, N.A. F/K/A FIRST CITY NATIONAL BANK OF HOUSTON -- McALLEN; NEW FIRST CITY, TEXAS-- HOUSTON, N.A., ITS TRANSFEREE, TEXAS COMMERCE BANK, NATIONAL ASSOCIATION, and GLENN W. TIMMONS,
Respondents

---

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

APPENDIX

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COUNSEL OF RECORD FOR PETITIONERS

CAUSE NO. C-539-90-G

| | | |
|---|---|---|
| JOSE DELGADO GARCIA and SONYA DELGADO, Plaintiffs | § | IN THE DISTRICT COURT |
| VS. | § | HIDALGO COUNTY, TEXAS |
| FIRST CITY, TEXAS-- HOUSTON, N.A. F/K/A FIRST CITY NATIONAL BANK OF HOUSTON -- McALLEN and GLENN TIMMONS, Defendants | § | 370TH JUDICIAL DISTRICT |

FINAL JUDGMENT

On the 27th day of April, 1992, came on to be heard the above-numbered and styled cause wherein Jose Delgado Garcia and Sonya Delgado are Plaintiffs and Cross-Defendants and First City, Texas-Houston, N.A. f/k/a First City National Bank of Houston-McAllen and Glenn Timmons are Defendants and First City, Texas-Houston, N.A. is a Cross-Plaintiff, and came all parties in person and by and through their attorneys of record and

announced ready for trial; and a jury of twelve persons having been selected, and the Plaintiffs and Cross-Defendant having presented their evidence; and the Defendants, First City, Texas-Houston, N.A. and Glenn Timmons having presented to the Court their Motion for Directed Verdict; and the Court being of the opinion that said motion should be granted; and having directed a verdict;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs, Jose Delgado Garcia and Sonya Delgado, take nothing against the Defendants, First City, Texas-Houston, N.A. f/k/a First City National Bank of Houston-McAllen and Glenn Timmons;

And First City, Texas-Houston, N.A. as Cross-Plaintiff having presented its evidence; and the Court being of the opinion that said Cross-Plaintiff, First

City, Texas-Houston, N.A. is entitled to judgment thereon as herein provided;

IT IS ORDERED, ADJUDGED AND DECREED that Cross-Plaintiff, First City, Texas-Houston, N.A., have and recover judgment in the amount of $50,000.00 together with interest thereon from the date of this Judgment until paid at the rate of ten percent (10.00%) per annum, compounded annually as allowed by law.

All costs of court are adjudged against and shall be paid by Jose Delgado Garcia and Sonya Delgado.

All writs and process for the enforcement and collection of this Judgment and the costs of court may issue as necessary.

All relief requested by any party hereto and not specifically granted is denied.

SIGNED this 4th day of May, 1992.

/s/ Harry Lewis
JUDGE PRESIDING

Hon. Kelly K. McKinnis, 1630 N. 10th, McAllen, Texas 78501
Hon. Edmundo O. Ramirez, 901 First City Bank Tower, McAllen, Texas 78501.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**McALLEN DIVISION**

| | | |
|---|---|---|
| **JOSE DELGADO** | **§** | |
| **GARCIA and** | **§** | |
| **SONYA DELGADO** | **§** | |
| | **§** | |
| **V.** | **§** | **CIVIL ACTION** |
| | **§** | **NO. M-92-230** |
| **FEDERAL DEPOSIT** | **§** | |
| **INSURANCE CORP.** | **§** | |
| **as Receiver for First** | **§** | |
| **City, Texas - Houston,N.** | **§** | |
| **A. and GLENN W. TIMMONS** | **§** | |

**AGREED ORDER ADOPTING STATE COURT JUDGMENT**

On the 2d day of December, 1993, it came to the Court's attention that under the rationale of two recent decisions of the 5th Circuit Court of Appeals, **5300 Memorial Investors, Ltd. v. RTC**, 973 F.2d 1160 (5th Cir. 1992) and **FDIC v. Kahlil Zoom-In Markets**, 978 F.2d. 183 (5th Cir. 1992), this court should adopt the state court judgment entered in Cause No. C-539-90-G. It is therefore ORDERED that the

Judgment signed on May 4, 1992, and entered in Cause No. C-539-90-G in the 370th District Court of Hidalgo County, Texas is ORDERED entered as the Judgment of this Court.

SIGNED this 2d day of December, 1993.

/s/ George P. Kazen
**HONORABLE ----------**
**UNITED STATES DISTRICT JUDGE**

**SUBMITTED BY:**

/s/ Deborah J. Greer by Kelly K. McKinnis by permission
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**CO-COUNSEL FOR APPELLEES NEW FIRST CITY, TEXAS - HOUSTON, N.A., AND ITS TRANSFEREE TEXAS COMMERCE BANK NATIONAL ASSOCIATION, and GLENN W. TIMMONS**

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**ATTORNEY IN CHARGE OF APPEAL FOR APPELLANTS JOSE DELGADO GARCIA AND SONYA DELGADO**

U.S. COURT OF APPEALS
FILED

DEC 09 1993

CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-7244

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JOSE DELGADO GARCIA and
SONYA DELGADO,

Plaintiffs-
Appellants

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver for First City, Texas - Houston, N.A. formerly known as First City National Bank of Houston - McAllen, ET AL.,

Defendants-
Appellees.

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Appeal from the United States District Court for the Southern District of Texas
(CA-M-92-230)

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Before GOLDBERG, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

AFFIRMED. See Local Rule 47.6.

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

U.S. COURT
OF APPEALS
FILED
JAN 06 1994
CHARLES R.
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Appeal from the United States District
Court for the Southern District of Texas

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**ON PETITION FOR REHEARING**

( JANUARY 6, 1994 )

Before GOLDBERG, JOLLY, and BARKSDALE,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above-entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/Rhesa S. Barksdale
United States
Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.